

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
BERNARD PASQUET	)	File No. 840247
	)	
Request for Rule Waiver for	)	
218-219 MHz Service License	)	
in Tallahassee, Florida (MSA #168A)	)	

**ORDER**

**Adopted: January 21, 2000**

**Released: January 25, 2000**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On December 31, 1996, Bernard Pasquet (Pasquet) requested a waiver of Section 1.2109(c) of the Commission's Rules regarding a 218-219 MHz Service license in Tallahassee, Florida, for which he was the high bidder.<sup>1</sup> For the reasons that follow, we deny Pasquet's waiver request.

**II. BACKGROUND**

2. In the *Competitive Bidding Second Report and Order*, the Commission determined that 218-219 MHz Service<sup>2</sup> licenses should be awarded through competitive bidding.<sup>3</sup> On July 28 and 29, 1994, Pasquet participated in the auctions for 218-219 MHz Service licenses.<sup>4</sup> Pasquet was the highest bidder on the license for MSA #168A.<sup>5</sup> Because Pasquet qualified as a small business, he was eligible to pay for the license through an installment payment plan.<sup>6</sup> The Commission's Rules required winning bidders to

<sup>1</sup>Letter from Bernard Pasquet to Federal Communications Commission (dated Dec. 31, 1996) (Pasquet Letter).

<sup>2</sup>The Interactive Video and Data Services was renamed the 218-219 MHz Service. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998) (*218-219 MHz Flex Order*). Accordingly, this service shall be referred to as the 218-219 MHz Service.

<sup>3</sup>Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348 (1994) (*Competitive Bidding Second Report and Order*).

<sup>4</sup>See *Public Notice*, Announcing High Bidders for 594 Interactive Video and Data Services (IVDS) Licenses, Mimeo No. 44160 (rel. Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (rel. Aug. 9, 1994).

<sup>5</sup>*Id.*

<sup>6</sup>47 C.F.R. §§ 1.2110(e), 95.816(d)(2)(1994).

bring their total deposits with the Commission to twenty percent of their winning bid by making two down payments of ten percent each.<sup>7</sup> The initial down payment was required within five business days after the release of a public notice announcing the winning bidders.<sup>8</sup> This public notice was released on August 2, 1994.<sup>9</sup> Pasquet submitted his initial down payment in a timely manner. The final down payment was required within five business days of the grant of the application.<sup>10</sup> Pasquet's application was granted on February 28, 1995.<sup>11</sup> Thus, Pasquet's final down payment was due on March 7, 1995.<sup>12</sup> On March 9, 1995, Pasquet filed a request to extend the deadline date for paying the final down payment.<sup>13</sup> On April 28, 1995, the Wireless Telecommunications Bureau (Bureau) denied the request.<sup>14</sup> Due to his failure to submit the requisite final down payment, Pasquet was in default as of March 8, 1995, and his license automatically cancelled as of that date.<sup>15</sup>

3. The Bureau's former Private Wireless Division notified Pasquet that the license was canceled and would be auctioned because he was in default.<sup>16</sup> Subsequently, on December 31, 1996, Pasquet submitted a request for a waiver of Section 1.2109(c) of the Commission's Rules, which provides the Commission with authority to offer a license for auction when the winning bidder defaults.<sup>17</sup> Pasquet argued that grant of this waiver request is in the public interest because it would allow the Commission to avoid the time and expense associated with auctioning the license.<sup>18</sup> He also argued that grant of this waiver request in combination with a proposed agreement to transfer the license to Wincom Corp. (Wincom) would serve the Commission's goal of rapid development and provision of viable 218-219 MHz Service to the public.<sup>19</sup>

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<sup>7</sup>47 C.F.R. §§ 95.816(c)(4), 1.2107(b), and 1.2110(e)(2)(1994).

<sup>8</sup>*Id.*

<sup>9</sup>*See Public Notice*, Announcing High Bidders for 594 Interactive Video and Data Services (IVDS) Licenses, Mimeo No. 44160 (rel. Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (rel. Aug. 9, 1994).

<sup>10</sup>*Id.*; *see* 47 C.F.R. § 1.2107(b)(1994).

<sup>11</sup>*See Public Notice*, Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, DA 95-152 (rel. Feb. 8, 1995).

<sup>12</sup>*Id.*

<sup>13</sup>Letter from Bernard Pasquet to Federal Communications Commission (dated Mar. 9, 1995).

<sup>14</sup>Requests to Extend Payment Deadline for the Interactive Video and Data Service (IVDS) Licenses, *Order*, 10 FCC Rcd. 4520 (WTB 1995) (*Payment Deadline Order*).

<sup>15</sup>*See, e.g.*, 47 C.F.R. § 1.2110(e)(4)(iii)(1994).

<sup>16</sup>Letter from Robert H. McNamara, Chief, Private Wireless Division, to Bernard Pasquet (undated).

<sup>17</sup>Pasquet Letter.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

4. On September 7, 1999, the Commission adopted three payment restructuring options for those 218-219 MHz Service licensees who were current on their installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998; or had properly filed grace period requests under the former installment payment rules.<sup>20</sup> The three options are: (a) reamortization of principal and interest installment payments over a ten-year period with subsequent resumption of payments;<sup>21</sup> (b) amnesty, wherein eligible licensees surrender any licenses they choose to the Commission for subsequent auction and, in return, have all the outstanding debt on those licenses forgiven, subject to Department of Justice approval and pursuant to applicable federal claims collections standards;<sup>22</sup> or (c) prepayment, whereby licensees may prepay the outstanding principal of any license it wishes to retain with cash and prepayment credits generated from down payments on spectrum returned to the Commission and any installment payments previously made.<sup>23</sup> Eligible licensees must elect one of the three restructuring options by filing a written notice with the Bureau.<sup>24</sup> As a result of the adoption of the payment restructuring options, the Commission dismissed all of the pending grace period requests.<sup>25</sup> For persons, such as Pasquet, who failed to make second down payments, the Commission did not allow them the opportunity to avail themselves of the options provided under the restructuring plan. The Commission noted that their licenses canceled automatically.<sup>26</sup>

### III. DISCUSSION

5. The Commission may exercise its discretion to waive a rule where the "unique or unusual factual circumstances" of the instant case would make application of the rule "contrary to the public interest."<sup>27</sup> In this case, Pasquet's unique or unusual factual circumstance is an unfavorable income to debt ratio that forced him to file for personal bankruptcy.<sup>28</sup> Pasquet, therefore, seeks to negate the

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<sup>20</sup>Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239, ¶ 37 (rel. Sep. 10, 1999) (*218-219 MHz Flex Report and Order*).

<sup>21</sup>*Id.* ¶¶ 43-44.

<sup>22</sup>*Id.* ¶¶ 46-48. While we will not give an eligible licensee that elects amnesty any credit for the down payment that is associated with the surrendered license when it is subsequently auctioned, neither will we restrict the eligibility to reacquire the surrendered license in such auction. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order on Reconsideration*, FCC 99-372, ¶ 6 (rel. Nov. 30, 1999).

<sup>23</sup>*218-219 MHz Flex Report and Order* at ¶ 34.

<sup>24</sup>*Id.* ¶ 54; *see Public Notice*, Wireless Telecommunications Bureau Announces Preliminary Implementation Procedures for 218-219 MHz Service Formerly Known as Interactive Video and Data Service (IVDS)), DA 99-3006, f.n. 5 (rel. Dec. 28, 1999).

<sup>25</sup>*218-219 MHz Flex Report and Order* at ¶ 45.

<sup>26</sup>*Id.* ¶ 38.

<sup>27</sup>47 C.F.R. § 1.925(b)(3)(ii)(1999); *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>28</sup>Pasquet Letter.

cancellation and proposed auction of his license with a waiver of Section 1.2109(c) of the Commission's Rules and afterwards, to finalize a license transfer agreement with Wincom, whereby Wincom will assume all debt and penalties owed on the license.<sup>29</sup> He argues that this scenario, if successful, will serve the public interest because it will speed the development and availability of viable 218-219 MHz Service under this particular license.<sup>30</sup> He further argues that such result will avoid the costs of auctioning the license.<sup>31</sup> We note that Section 1.2109(c) of the Commission's Rules applies to winning bidders who default "after having made the required down payment."<sup>32</sup> On the other hand, Section 1.2109(b) of the Commission's Rules applies to winning bidders, such as Pasquet, who fail "to remit the required down payment within five (5) business days" after the auction has closed.<sup>33</sup> We, therefore, will treat Pasquet's request as a request for waiver of Section 1.2109(b) of the Commission's Rules.

6. We note, first and foremost, that an unanticipated lack of financing is not a unique or unusual factual circumstance.<sup>34</sup> We find that bidders assume the risk that unexpectedly poor financial circumstances, which could even lead to bankruptcy, might occur at a later date.<sup>35</sup> If we treat a bidder's unfavorable income to debt ratio as a unique or unusual factual circumstance that justifies a waiver of Section 1.2109(b) of the Commission's Rules and then allow the bidder to "shop" the license later in an effort to obtain financing, "we will further encourage such undesirable conduct and lessen the likelihood that in the future only serious, qualified bidders will participate in Commission-sponsored auctions."<sup>36</sup> Therefore, we believe that grant of this requested waiver under the circumstances presented is not in the public interest because it would undermine the integrity of the auction process itself.<sup>37</sup> We find that there is no firm evidence to support Pasquet's argument that granting the waiver request and allowing the license transfer to Wincom will speed the development and availability of viable 218-219 MHz Service. We do not believe that a petitioner's speculative predictions constitutes a sufficient basis for granting a waiver request.<sup>38</sup> Moreover, even if petitioner's plan did result in the expeditious use of spectrum

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<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>47 C.F.R. § 1.2109(c)(1994) (emphasis added).

<sup>33</sup>47 C.F.R. § 1.2109(b)(1994).

<sup>34</sup>See Requests for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, *Memorandum Opinion and Order*, 10 FCC Rcd. 12153, 12155 (1995).

<sup>35</sup>*Id.*

<sup>36</sup>See Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd. 6384, 6386 (CCB 1994); see also *Mountain Solutions, Ltd., Inc. v. FCC*, No. 98-1503, 1999 WL 1082874 (D.C. Cir. Dec. 3, 1999) (upholding Commission's denial of request seeking waiver of second down payment rules).

<sup>35</sup>*Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2381.

<sup>38</sup>See Application of Gillett Broadcasting of Maryland, Inc., and Scripps Howard Broadcasting Company for Consent to the Assignment of the License of WMAR-TV, Baltimore, Maryland, *Memorandum Opinion and Order*, 6 FCC Rcd. 81, 82 (1990) (Specific facts, not speculative suggestions, that a rule waiver request is not in the public interest are necessary when seeking a denial of such request.).

covered by his cancelled license, the precedent of granting such a waiver would, over the long run, create an overall delay of service to the public by encouraging the type of inefficient licensee behavior that has given rise to Pasquet's request. Finally, we are not persuaded by Pasquet's argument that granting the requested waiver will help the Commission avoid auction costs, because it ignores the fact that the rule which is the subject of the waiver request, Section 1.2109(b) of the Commission's Rules, provides the Commission with the means to recover such costs.<sup>39</sup> In light of the Commission's refusal to grant relief to entities such as Pasquet in the *218-219 MHz Flex Order* and Pasquet's failure to satisfy the waiver standard, we deny Pasquet's request for a waiver.

#### IV. ORDERING CLAUSES

7. ACCORDINGLY, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.925(b)(3)(ii) of the Commission's Rules, 47 C.F.R. § 1.925(b)(3)(ii), the rule waiver request that was filed by Bernard Pasquet on December 31, 1996, IS DENIED.

8. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>39</sup>47 C.F.R. § 1.2109(b)(1994) (A winning bidder who defaults will be liable for the penalty set forth in § 1.2104(g)(2). In such event, the Commission may conduct another auction for the license or offer it to the other highest bidders.); 47 C.F.R. § 1.2104(g)(2)(1994) (If the defaulting party's bid is greater than the subsequent winning bid when the license is re-auctioned, the penalty will be equal to the difference between the two bids. An additional penalty equal to three percent of the subsequent bid will also be assessed. If the subsequent bid is greater, the Commission will only assess a penalty equal to three percent of the defaulting party's bid amount. All penalties will be deducted from any upfront payments or down payments that the defaulting party deposited with the Commission.).